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9
10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE EASTERN DISTRICT OF WASHINGTON

12 NORTHWEST ENVIRONMENTAL
13 ADVOCATES, an Oregon non-profit
14 corporation,

15 Plaintiff,
16 v.

17 UNITED STATES NATURAL
18 RESOURCES CONSERVATION
19 SERVICE, an agency of the United States
20 of America,

21 Defendant.

Case No. 19-336

COMPLAINT

22 INTRODUCTION

23
24 1. This is an action against the U.S. Natural Resources Conservation Ser-
25 vice (“NRCS”) for alleged violations of the Freedom of Information Act (“FOIA”
26 or “Act”), 5 U.S.C. § 552. Plaintiff Northwest Environmental Advocates
27 (“NWEA”) challenges NRCS’s failure to respond to NWEA’s February 6, 2018
28

COMPLAINT - 1

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1 administrative FOIA appeal within the twenty-day timeline set by the Act, and
2 NRCS's unlawful withholding of records subject to that appeal and responsive to
3 NWEA's related May 31, 2017 FOIA request. NWEA seeks declaratory relief, an
4 injunction requiring EPA to comply with the FOIA, and an award of reasonable at-
5 torneys' fees and other litigation costs.
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7 **JURISDICTION AND VENUE**

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9 2. This Court has jurisdiction pursuant to 5 U.S.C. § 552(a)(4)(B)
10 (FOIA) and 28 U.S.C. §§ 1331 (federal question), 1346 (United States as defend-
11 ant), 2201 (declaratory judgment), and 2202 (further relief).
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13 3. This Court is the proper venue for this case because, pursuant to 5
14 U.S.C. § 552(a)(4)(B), the records responsive to NWEA's FOIA requests are lo-
15 cated in this district and because, under 28 U.S.C. § 1391(e), a substantial part of
16 the events or omissions giving rise to plaintiff's claims occurred in this district.
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18 **PARTIES**

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20 4. Plaintiff NORTHWEST ENVIRONMENTAL ADVOCATES is a
21 non-profit entity organized under Section 501(c)(3) of the Internal Revenue Code,
22 with its principal place of business in Portland, Oregon. Founded in 1969, NWEA
23 has actively worked for over 30 years to protect and restore water quality and fish
24 habitat in the Northwest. NWEA employs community organizing, strategic partner-
25 ships, public records requests, information sharing, advocacy with administrative
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1 agencies, expert analysis, lobbying, and litigation to ensure better implementation
2 and enforcement of the laws that preserve the natural environment and protect wa-
3 ter quality. NWEA also provides advice and information to many environmental
4 organizations across the country. It has repeatedly proven itself a leader in protect-
5 ing water quality and endangered aquatic species, and actively participates in many
6 state and federal agency actions that affect water quality in the Pacific Northwest
7 and across the nation.
8

10 5. NWEA and its members derive benefits from agencies' compliance
11 with the FOIA and from its receipt of public records. In aid of its efforts to protect
12 and restore the environment, NWEA regularly uses the FOIA to obtain records
13 from federal agencies. NWEA requested the records sought in this action in sup-
14 port of its advocacy efforts and NRCS's failure to comply with the FOIA hinders
15 NWEA's work.
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18 6. The above-described interests of NWEA and its members have been,
19 are being, and, unless the relief prayed for herein is granted, will continue to be ad-
20 versely affected by NRCS's disregard of its statutory duties under the FOIA and by
21 the unlawful harm that results. NRCS's failure to fully implement the FOIA injures
22 the interests of NWEA and its members and the relief requested in this lawsuit can
23 redress these injuries. These harms are traceable to NRCS's conduct and would be
24 remedied by the relief sought in this action.
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1 7. Defendant UNITED STATES NATURAL RESOURCES
2 CONSERVATION SERVICE is an agency of the executive branch of the United
3 States government subject to the FOIA pursuant to 5 U.S.C. § 552(f). NRCS is in
4 possession or control of public records requested and sought by NWEA.
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6 **STATUTORY BACKGROUND**
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8 8. The purpose of the FOIA is “to open agency action to the light of pub-
9 lic scrutiny.” *U.S. DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S.
10 749, 772 (1989) (quoting *Dep’t of the Air Force v. Rose*, 425 U.S. 352, 372
11 (1976)). “Congress believed that this philosophy, put into practice, would help ‘en-
12 sure an informed citizenry, vital to the functioning of a democratic society.’” *U.S.*
13 *DOJ v. Tax Analysts*, 492 U.S. 136, 142 (1989) (quoting *NLRB v. Robbins Tire &*
14 *Rubber Co.*, 437 U.S. 214, 242 (1978)).
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17 9. The FOIA requires federal agencies to make records in their posses-
18 sion or control available to the public upon request unless one of the FOIA’s nine
19 specific exemptions applies. 5 U.S.C. § 552(a), (b)(1)–(9). Federal agencies bear
20 the burden of demonstrating to a court that any withholding of responsive records
21 is consistent with the FOIA. 5 U.S.C. § 552(a)(4)(B). Even if an agency meets its
22 burden to prove that a responsive record contains information that is exempt from
23 disclosure, the agency must nevertheless disclose any non-exempt information if it
24 can be segregated from the exempt materials. 5 U.S.C. § 552(b).
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1 10. The FOIA imposes strict and rigorous deadlines on federal agencies.
2 The FOIA requires a federal agency that receives a FOIA request to determine
3 whether the requested records are exempt from disclosure under 5 U.S.C. § 552(b)
4 and to communicate that determination to the requester within twenty business
5 days. *Id.* § 552(a)(6)(A)(i). If the agency determines the requested records are ex-
6 empt from public disclosure, the agency must also communicate to the requester
7 that they have a right to appeal that determination. *Id.* If the agency determines the
8 records are not exempt from public disclosure, the agency is required to make the
9 requested records “promptly available” to the requester. *Id.* § 552(a)(3)(A),
10 (a)(6)(C)(i). To ensure a requester receives all requested documents, the FOIA re-
11 quires agencies to conduct a search that is reasonably calculated to uncover all rec-
12 ords responsive to the request. 5 U.S.C. § 552(a)(3)(C)–(D).

17 11. Congress set forth the circumstances in which federal agencies may
18 obtain more time to make the determination required by 5 U.S.C. §
19 552(a)(6)(A)(i). In two very limited circumstances the agency may toll the twenty-
20 day deadline for making that determination. 5 U.S.C. § 552(a)(6)(A)(ii). Addition-
21 ally, the agency may extend the twenty-day deadline for making that determination
22 by providing a written notice to the requester that sets forth the “unusual circum-
23 stances” that justify a 10-day deadline extension and the date on which the agency
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1 expects to make the determination. 5 U.S.C. § 552(a)(6)(B)(ii). The statute in-
2 cludes a specific definition of the term “unusual circumstances.” 5 U.S.C. §
3 552(a)(6)(B)(iii).
4

5 12. The FOIA requires agencies to notify requesters of their right to ap-
6 peal adverse FOIA determinations. 5 U.S.C. § 552(a)(6)(A)(i)(III)(aa). Requesters
7 must submit such appeals within ninety days of receiving the adverse determina-
8 tion. *Id.* If the requester appeals an agency’s determination, the agency must make
9 a determination with respect to that appeal within twenty business days of receiv-
10 ing the appeal. 5 U.S.C. § 552(a)(6)(A)(ii).
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13 13. In addition to imposing response deadlines, the FOIA also requires
14 federal agencies to communicate with requesters about the status of the agencies’
15 efforts to respond to a FOIA request. Specifically, the FOIA requires agencies to
16 assign tracking numbers to each request that will take longer than ten days to pro-
17 cess; to provide that tracking number to each person making such a request; and to
18 establish a telephone line or internet service that provides information about the
19 status of a request to the requester, including an estimated date by which the
20 agency will complete its work. *Id.* § 552(a)(7).
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24 14. A U.S. District Court has jurisdiction “to enjoin the agency from with-
25 holding agency records and to order the production of any agency records improv-
26 erly withheld from the complainant.”
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STATEMENT OF FACTS

15. On or around May 31, 2017, NWEA submitted a FOIA request to NRCS seeking documents regarding the control of polluted runoff from agriculture in Washington State. NRCS received NWEA's May 31, 2017 FOIA request. On or around June 5, 2017, NRCS acknowledged receipt of NWEA's FOIA request, assigned NWEA's May 31, 2017 FOIA request reference number 2017-NRCS-04787-F, and granted NWEA's request for a fee waiver.

16. On June 30, 2017, NRCS requested an extension of the time to respond to NWEA's May 31, 2017 FOIA Request. On July 6, 2017, NWEA agreed to extend NRCS's time for responding to the FOIA request.

17. On September 14, 2017, NRCS sent NWEA an email stating that it was processing numerous emails pursuant to the FOIA request. On November 3, 2017, NRCS sent NWEA an interim response of 148 pages of records pertaining to one item in the FOIA request.

18. On November 27, 2017, NWEA sent NRCS a letter reminding NRCS of its FOIA obligations and deadlines and requesting an estimated completion date.

19. For NWEA's May 31, 2017 FOIA request, NRCS did not make the determinations required by the FOIA within the twenty-day deadline imposed by the Act. Instead, by letter dated November 28, 2017, NRCS sent NWEA its final response to NWEA's May 31, 2017 FOIA request. In its final response, NRCS

1 stated it was withholding 293 pages of responsive records.

2 20. On or around February 6, 2018, NWEA filed an administrative FOIA
3 appeal of NRCS's response to NWEA's May 31, 2017 FOIA request. NWEA's
4 FOIA appeal alleged that NRCS's FOIA response and production of documents
5 was incomplete and inconsistent with the FOIA. NRCS did not assign NWEA's
6 February 6, 2018 administrative FOIA appeal a reference number.
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9 21. NRCS missed the 20-day deadline for responding to NWEA's admin-
10 istrative FOIA appeal. By letter dated March 08, 2018, an employee of NRCS
11 stated to NWEA that, "I have carefully reviewed the specific issues you raised con-
12 cerning the final action on this request. For most of these specific documents, your
13 appeal will be granted in whole or in part. I am still in the process of reviewing
14 each of the seventy specific documents you appealed. I am hopeful that my review
15 of these items will be completed by April 6, 2018."
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18 22. In July 2019, an employee of NRCS or another component of the U.S.
19 Department of Agriculture stated to NWEA in an email that the agency was inter-
20 ested in resolving NWEA's FOIA appeal "as expeditiously as practicable."
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23 23. The deadline for NRCS to issue the final determinations required by 5
24 U.S.C. § 552(a)(6)(A)(ii) for NWEA's administrative FOIA appeal has passed. As
25 of the date this action was filed, NRCS had not provided NWEA with the determi-
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1 nations required by 5 U.S.C. § 552(a)(6)(A)(ii) for NWEA's February 6, 2018 ad-
2 ministrative FOIA appeal. As of the date this action was filed, NRCS had not pro-
3 vided NWEA with an estimated date by which NRCS would make the final deter-
4 minations required by 5 U.S.C. § 552(a)(6)(A)(ii) for NWEA's administrative
5 FOIA appeal.
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8 24. As of the date NWEA filed this lawsuit, NRCS had failed to provide
9 NWEA with records, or reasonably segregable portions of records, that are respon-
10 sive to NWEA's February 6, 2018 administrative FOIA appeal. As of the date
11 NWEA filed this lawsuit, NRCS had failed to provide NWEA with records, or rea-
12 sonably segregable portions of the records, that are responsive to NWEA's May
13 31, 2017 FOIA request.
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16 25. As of the date NWEA filed this lawsuit, NRCS had failed to make
17 promptly available to NWEA records, or reasonably segregable portions of rec-
18 ords, that are responsive to NWEA's February 6, 2018 administrative FOIA ap-
19 peal. As of the date NWEA filed this lawsuit, NRCS had failed to make promptly
20 available to NWEA records, or reasonably segregable portions of records, that are
21 responsive to NWEA's May 31, 2017 FOIA request to NRCS.
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24 26. NRCS is unlawfully withholding from NWEA non-exempt documents
25 that are responsive to NWEA's February 6, 2018 administrative FOIA appeal.
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1 NRCS is unlawfully withholding from NWEA non-exempt documents that are re-
2 sponsive to NWEA's May 31, 2017 FOIA request to NRCS. None of FOIA's nine
3 exemptions to mandatory disclosure apply to all the documents NRCS is currently
4 withholding from NWEA. NRCS has no legal basis for withholding all the records
5 that NWEA sought via its FOIA request and appeal.
6

7
8 27. As of the date this action was filed, NRCS had constructively denied
9 NWEA's February 6, 2018 administrative FOIA appeal. As of the date this action
10 was filed, NRCS had constructively denied in part NWEA's May 31, 2017 FOIA
11 request to NRCS.
12

13 28. Prior to filing this action NWEA fully exhausted all administrative
14 remedies required by the FOIA. 5 U.S.C. § 552(a)(6)(A), (a)(6)(C).
15

16 29. NWEA has been required to expend costs and to obtain the services of
17 a law firm to prosecute this action.
18

19 30. The filing of this lawsuit was necessary to compel NRCS to comply
20 with the FOIA's deadline for making the determinations required by 5 U.S.C. §
21 552(a)(6)(A)(ii) for NWEA's February 6, 2018 administrative FOIA appeal. The
22 filing of this lawsuit was necessary to compel NRCS to comply with the FOIA's
23 deadline for making the determinations required by 5 U.S.C. § 552(a)(6)(A)(i) for
24 NWEA's May 31, 2017 FOIA request to NRCS.
25

26 31. The filing of this lawsuit was necessary to compel NRCS to disclose
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1 the non-exempt documents that are responsive to NWEA's February 6, 2018 ad-
2 ministrative FOIA appeal. The filing of this lawsuit was necessary to compel
3 NRCS to disclose the non-exempt documents that are responsive to NWEA's May
4 31, 2017 FOIA request to NRCS.
5

6 32. NRCS could have made the determinations required by 5 U.S.C.
7 § 552(a)(6)(A)(ii) for NWEA's February 6, 2018 administrative FOIA appeal to
8 NRCS before NWEA filed this lawsuit. NRCS could have disclosed the records re-
9 sponsive to NWEA's February 6, 2018 administrative FOIA appeal to NRCS be-
10 fore NWEA filed this lawsuit.
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13 33. NWEA claims for relief in this Complaint are not insubstantial.
14

15 34. The delays at issue in this case result from a predictable agency work-
16 load of FOIA requests or administrative FOIA appeals. NRCS has not made rea-
17 sonable progress in reducing its backlog of pending requests and/or appeals.
18

19 35. The circumstances surrounding the withholdings raise questions re-
20 garding whether agency personnel acted arbitrarily or capriciously with respect to
21 the withholdings at issue in this case.
22

23 36. Based on the nature of NWEA's professional activities, NWEA will
24 continue to employ the FOIA's provisions in information requests to NRCS in the
25 foreseeable future. NWEA's professional activities will be adversely affected if
26 NRCS is allowed to continue violating the FOIA's disclosure provisions. Unless
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1 enjoined and made subject to a declaration of NWEA's legal rights by this Court,
2 NRCS will continue to violate the rights of NWEA to receive public records under
3 the FOIA.
4

5 **CAUSES OF ACTION**

6 **CLAIM 1**

7 **VIOLATIONS OF THE FREEDOM OF INFORMATION ACT IN**
8 **RESPONDING TO NWEA'S FEBRUARY 6, 2018 ADMINISTRATIVE**
9 **APPEAL: VIOLATION OF THE DECISION DEADLINES IN THE FOIA**

10 37. NWEA hereby incorporates by reference the allegations in the preced-
11 ing paragraphs.

12 38. NWEA has a statutory right to have NRCS process NWEA's February
13 6, 2018 administrative FOIA appeal in a manner that complies with the FOIA.
14 NRCS violated NWEA's rights in this regard when NRCS unlawfully delayed its
15 response to NWEA's February 6, 2018 administrative FOIA appeal beyond the
16 deadlines imposed by the FOIA.
17
18

19 39. NRCS violated and is violating the FOIA by failing to respond to
20 NWEA's February 6, 2018 administrative FOIA appeal by the deadline set forth in
21 5 U.S.C. §552(a)(6)(A)(ii).
22

23 **CLAIM 2**

24 **VIOLATION OF THE FREEDOM OF INFORMATION ACT:**
25 **UNLAWFUL CONSTRUCTIVE DENIAL/UNLAWFUL WITHHOLDING**

26 40. NWEA hereby incorporates by reference the allegations in the preced-
27 ing paragraphs.
28

1 41. NWEA has a statutory right to the records, or portions of records, it
2 seeks. There is no legal basis for NRCS to withhold records responsive to
3 NWEA's February 6, 2018 administrative FOIA appeal and May 31, 2017 FOIA
4 request.
5

6 42. NRCS has violated and is violating NWEA's rights by unlawfully
7 withholding non-exempt documents responsive to NWEA's February 6, 2018 ad-
8 ministrative FOIA appeal and May 31, 2017 FOIA request. NRCS's actions in re-
9 sponse to NWEA's February 6, 2018 administrative FOIA appeal constitute con-
10 structive and/or unlawful denials of NWEA's appeal.
11
12

13 **PRAYER FOR RELIEF**

14 WHEREFORE, NWEA respectfully requests that the Court:
15

16 A. Declare that NRCS has violated the FOIA for the reasons set forth
17 above;
18

19 B. Order NRCS to comply immediately with the FOIA by providing
20 NWEA with the required determinations and non-exempt public records subject to
21 NWEA's February 6, 2018 administrative FOIA appeal and May 31, 2017 FOIA
22 request;
23

24 C. Declare that NWEA is the prevailing party and/or substantially pre-
25 vailing party in this matter;
26
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1 D. Award NWEA its reasonable attorneys' fees and litigation costs pur-
2 suant to 5 U.S.C. § 552(a)(4)(E); and

3
4 E. Grant NWEA such additional relief as the Court may deem just or
5 proper.

6
7 DATED this 3rd day of October 2019.

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